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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

OPHIR RF, INC., Plaintiff and Appellant, v. EFRAIM BAINVOLL et al., Defendants and Respondents.	B182423 (Los Angeles County Super. Ct. No. SC061484)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anthony J. Mohr, Judge. Affirmed.

Law Offices of Bruce Altschuld and Bruce Altschuld for Plaintiff and Appellant.

Warden, Urtnowski & Zaharoni, J. Brian Urtnowski, and William P. Warden for Defendants and Respondents.

Plaintiff Ophir RF, Inc., sued its former employees, defendants Efraim Bainvoll, Gerhard Peter, and Wong Ju Kong, Jr., and their current employer, defendant Empower RF Systems, Inc., for misappropriation of trade secrets and related claims. After the jury returned a defense verdict, the trial court entered judgment for defendants and denied motions for judgment notwithstanding the verdict and new trial. On appeal, Ophir contends that its motion for new trial should have been granted because of jury misconduct. We affirm.

BACKGROUND

Preliminarily, we note that the statement of facts in Ophir's opening brief primarily describes the evidence that was rejected by the jury's defense verdict. Given that Ophir does not challenge the sufficiency of the evidence to support the judgment or the denial of its motion for judgment notwithstanding the verdict, we will not restate the evidence in the light most favorable to the judgment, but will focus on the new trial motion that is the subject of this appeal. Unless otherwise indicated, references to jurors' statements are taken from the declarations filed either in support of, or in opposition to, the new trial motion.

The jury trial, which began in late May 2004, concluded, after several interruptions, on September 21, 2004. On September 22, the first day of deliberations, the jury requested a readback of the full testimony of six witnesses. According to the jury foreperson, Teresa M.,[1] the request was made at the behest of Juror Xutuanu K., who said that he "did not remember much from the trial." Although the trial court agreed to the request, it instructed the jury to continue deliberating while the transcript was being prepared, which would "take some time."

According to Juror Herbert H., the jury withdrew its request for a readback on September 23, after agreeing with Foreperson M.'s suggestion to rely on their own

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[1] Foreperson M. is a deputy district attorney.

recollections and notes, and to request a readback only if they could not agree on the evidence. Juror H. attested that there were no objections to this decision.

The jury had to restart its deliberations on two occasions when jurors were replaced for reasons unrelated to the misconduct allegations. One juror was replaced by Alternate Juror Roxana R. on September 28; another was replaced by Alternate Juror William F. on September 30.

On Friday, October 1, the second day of the reconstituted jury's deliberations, the jury sought clarification of the special verdict form regarding the civil conspiracy questions. On Monday, October 4, the jury returned a nine-to-three defense verdict.

Following the entry of judgment for defendants, Ophir moved for a new trial based on juror misconduct.[2] (Code Civ. Proc., § 657, subd. (2).)[3] Ophir submitted supporting declarations from the three dissenting jurors, Richard R., Aaron M., and Roxana R., who described alleged instances of juror misbehavior during deliberations, as discussed below. Ophir also submitted supporting declarations from Jurors Noelia G. and K., who voted with the majority, and an alternate, Elizabeth R.

In opposition to the new trial motion, defendants submitted counterdeclarations from four jurors, Kenneth D., M., H., and F., who, as discussed below, denied that the alleged misconduct had occurred. Although defendants also submitted counter-

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[2] As only the denial of the motion for new trial is being challenged on appeal, we will not discuss the denial of Ophir's motion for judgment notwithstanding the verdict.

[3] Unless otherwise indicated, all statutory references are to the Code of Civil Procedure. Section 657 provides in relevant part: "The verdict may be vacated . . . and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] . . . [¶] 2. Misconduct of the jury . . . ."

Although Ophir also sought a new trial based on grounds of irregularities in the proceedings (§ 657, subd. (1)), inadequate damages (§ 657, subd. (5)), insufficient evidence (§ 657, subd. (6)), and legal error (§ 657, subds. (6), (7)), the opening brief does not address those issues, which we deem to be waived.

declarations from Jurors John L. and Sandra D., their declarations were not reviewed by the trial court because they were untimely.

After considering the supporting and opposing declarations, the trial court stated that the counterdeclarations were, on balance, more credible. The trial court concluded that Ophir had failed to establish the existence of either juror misconduct or prejudice. The motion was denied and this appeal followed.

DISCUSSION

I. Standard of Review

Ophir contends that it is entitled to a new trial because of juror misconduct during deliberations. In reviewing the order of denial, which is appealable as a postjudgment order under section 904.1, subdivision (a)(2), we must first determine whether juror misconduct occurred. "In determining whether juror misconduct occurred, '[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.' (*People v. Nesler* (1997) 16 Cal.4th 561, 582 (lead opn. of George, C. J.); see *People v. Pride* (1992) 3 Cal.4th 195, 260 . . . ['we defer to the court's observations and credibility determinations' regarding whether misconduct occurred].)" (*People v. Schmeck* (2005) 37 Cal.4th 240, 294.) If the trial court's factual findings are supported by substantial evidence, we defer to them.[4] (*Ibid.*)

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[4] Under the substantial evidence standard of review, we may not substitute our deductions for those of the trial court. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60.) In general, we look "'"*only at the evidence supporting the successful party, and disregard*[] *the contrary showing*." [Citation.] All conflicts, therefore, must be resolved in favor of the respondent.'" (*Id.* at p. 60.) "'When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' [Citation.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." (Evid. Code, § 411.)

If we conclude that there was juror misconduct, we must decide whether Ophir was prejudiced by that misconduct, which presents a mixed question of law and fact. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 582.) In making this assessment, we defer to the trial court's factual findings that are supported by substantial evidence, and "independently determine whether, from the nature of [the juror's] misconduct and all the surrounding circumstances, there is a substantial likelihood" that the misconduct was prejudicial. (*Id.* at pp. 582-583.)

II. The Declarations

"Declarations recounting statements, conduct or events 'open to sight, hearing, and the other senses and thus subject to corroboration' are admissible to establish juror misconduct. Declarations submitted as proof of an individual juror's subjective reasoning processes, which can be neither corroborated nor disproved, are not. [Citations.]" (*Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 681, fn. 1.) "Where no affidavits or declarations are introduced to counter the evidence of jury misconduct proffered on a new trial motion, the acts are deemed established, and the only issue is whether they are harmful or prejudicial. [Citations.]" (*Tapia v. Barker* (1984) 160 Cal.App.3d 761, 766.)

In this case, the trial court stated that the new trial motion turned on a "battle of the juror declarations." After weighing the conflicting evidence, the trial court rejected the misconduct allegations, stating that "on balance[,] the declarations submitted by the defendants are more credible."

Although Ophir argues on appeal that the counterdeclarations did not outweigh the evidence of misconduct, the opening brief for the most part neglects to describe the substance of the counterdeclarations. Ophir argues that the counterdeclarations did not rebut certain evidence of misconduct and that the supporting "declarations were much more specific — recounting exact quotes from jurors while Respondent's declarations either failed to directly address the testimony or otherwise avoided specifically responding. In many instances Respondents' juror declarations were based on the

subjective belief of other jurors or were simply conclusory." But Ophir ignores the fact that several allegations of misconduct were specifically rebutted by the counterdeclarations. As to the allegations that were rebutted, we could reject Ophir's contentions on the basis of waiver,[5] but we will not do so because defendants have fully addressed each contention and have not been prejudiced by Ophir's failure to present a complete statement of the evidence before the trial court.

III. The Specific Allegations of Juror Misconduct

A. Juror D.

Ophir contends that Juror D. committed misconduct by falsely responding on the jury questionnaire that he had not worked with amplifiers when, according to the declarations in support of the new trial motion, he told other jurors that he "'designed amplifiers for NASA'" and that Ophir's amplifiers were "'garbage.'" We disagree.

In his counterdeclaration, which is not mentioned in the opening brief, Juror D. expressly denied stating that he had designed amplifiers. Juror D. declared, "I have read comments from jurors Noelia [G.], Xutuanu [K.], and Richard [R.] suggesting that I said

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[5] "'The rule is well established that a reviewing court must presume that the record contains evidence to support every finding of fact, and an appellant who contends that some particular finding is not supported is required to set forth in his brief a summary of the material evidence upon that issue. Unless this is done, the error assigned is deemed to be waived. [Citation.] It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings. The reviewing court is not called upon to make an independent search of the record where this rule is ignored. [Citation.]' (*McCosker v. McCosker,* 122 Cal.App.2d 498, 500.) 'A claim of insufficiency of the evidence to justify findings, consisting of mere assertion without a fair statement of the evidence, is entitled to no consideration, when it is apparent, as it is here, that a substantial amount of evidence was received on behalf of the respondents. Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift his responsibility in this manner.' (*Estate of Palmer,* 145 Cal.App.2d 428, 431.)" (*Grand v. Griesinger* (1958) 160 Cal.App.2d 397, 403.)

that I had 'designed amplifiers[.'] Their recollections are wrong. At no time did I say that I had designed amplifiers, nor have I ever done so in my life. [¶] . . . I have been advised that Plaintiff's counsel, Bruce Altschuld, claims that I did not give an appropriate response to item number 24 on the juror questionnaire. I have reviewed the questionnaire, and take exception to that inference. It is true that I circled the 'no' block on the question asking about 'amplifiers[.'] I have never worked with RF [radio frequency] amplifiers, or amplifiers similar to those involved in this case, at anytime in my life. I have never had, nor do I now possess, any special knowledge regarding those types of amplifiers."

Although Juror D. worked with amplifiers many years ago, he disclosed this fact during voir dire and explained that he never worked with the modern radio frequency amplifiers that were the subject of this litigation. Juror D. stated that the amplifiers he had worked with "were not technologically like they are nowadays," because "[t]he technology of microchip has changed everything. We didn't have that. I worked with lots of vacuum tubes."

According to Foreperson M., when Juror D. stated at the beginning of deliberations "that he had had some experience in amplifiers[, she] admonished him that he had to decide this case on the evidence in the case and he agreed that he would. He did not raise the issue of his experiences again." Assuming that Juror D. referred to Ophir's amplifiers as "garbage," which is an allegation not addressed in the counterdeclarations, because Juror D. did not design (or claim to have designed) amplifiers and did not raise the issue of his experience after being admonished by Foreperson M., it would be purely speculative to conclude that Juror D.'s criticism of Ophir's amplifiers was based on his prior experience rather than the evidence presented at trial.

We conclude the record supports the trial court's determination that Juror D. did not commit the alleged misconduct.

B. Juror L.

Ophir contends that Juror Bo L. committed misconduct by sleeping while the jury was voting. According to the declarations in support of the new trial motion, Juror L. "was sleeping on the couch in the jury room. [Juror L.'s] eyes were closed while he was laying on the couch during voting. [Foreperson M.] would tap him on the leg, his arm would go up and his vote would be counted for the majority."

Foreperson M. stated, however, that Juror L. was never asleep during deliberations, which is a point not mentioned in Ophir's opening brief. Foreperson M. explained that there was one occasion when Juror L. had asked to lie on the couch because of a headache and promised not to fall asleep. "Since the couch was next to me, I was able to keep an eye on [Juror L.] and can attest that he never fell asleep. I can say this because whenever I called the vote, he raised his hand readily. Other than this one occasion, [Juror L.] was actively involved in the deliberations, readily expressing his opinions." Similarly, Juror H. attested that "[a]t no time did [Juror L.] fall asleep. [Juror L.] participated in the deliberations throughout and voted on all of the issues, as did all of the jurors in this matter."

Ophir also contends that Juror L. committed misconduct by drinking alcohol during the trial. Elizabeth R., an alternate juror, attested to smelling alcohol on Juror L.'s breath both before and during deliberations. This allegation, even if true, does not establish that Juror L. was impaired from performing his duties as a juror. Although we do not condone the practice, consuming alcohol is not misconduct if it did not affect the juror's capacity to perform his duties. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 412, disapproved on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.) In this case, both Foreperson M. and Juror H. attested that Juror L. had performed his duties as a juror.

We conclude the record supports the trial court's finding that Juror L. did not commit the alleged misconduct.

C. Foreperson M.

Ophir contends that Foreperson M., a deputy district attorney, committed misconduct by: (1) refusing to transmit juror requests for readbacks of testimony; (2) telling jurors to rely on her notes of the evidence at trial; (3) practicing law in the jury room; and (4) becoming so infatuated with defendant Bainvoll that she was biased in his favor.

1. Readbacks of Testimony

The record shows that at Juror K.'s request, Foreperson M. asked for a readback of the testimony of six witnesses, but withdrew the request after the jurors agreed to rely on their own recollections and notes, and to request readbacks only if they disagreed on the evidence. Juror H. attested that there were no objections to this decision.

In support of the new trial motion, Juror K. stated that he "specifically asked for the readbacks of Mr. Bainvoll and Mr. Yulsari," but "[Foreperson M.] would not send out a note to have testimony read back by the court reporter because she said it would cost the courts a lot of money to pay for the court reporter to read back the testimony." Foreperson M. responded, however, that she believed Juror K. had withdrawn this request, which is another point not addressed in the opening brief. Foreperson M. explained that "[Juror K.] requested a readback of one of the witnesses['] testimony even though at least nine recollected the same set of facts. I asked the rest of the jurors if any one of them needs the readback. No one else concurred with [Juror K.]'s request. I pointed this out to [Juror K.] and he didn't respond nor did he further insist on the readback and from this, I assumed he was going along with the con[s]ensus. At no point during the days we deliberated did [Juror K.] ask again for a readback of that or any other testimony. In fact, he had no problems casting his vote when the group reached that point."

Both Foreperson M. and the trial court reasonably inferred from Juror K.'s silence that he had withdrawn his request for a readback. Accordingly, we defer to the trial court's finding that the alleged misconduct did not occur.

2. Notes

Ophir contends that Foreperson M. committed misconduct by violating the following jury instruction: "Your independent recollection of the evidence should govern your verdict, and you should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember. Now, the court reporter is making a record of everything that is said, and if during deliberations you have a question about what the witness said, you should ask that the court reporter's records be read to you. You must accept the court reporter's records as accurate."

According to Juror G., Foreperson M. told the jury to "rely on her notes instead of readbacks." Juror Aaron M. similarly attested that "[o]n several occasions during the deliberations, when one of the jurors requested read-backs, [Foreperson M.] explained that it would 'cost the county money' and the jury should rely on her notes. She said her notes were tabbed." Juror R. also declared that "[Foreperson M.] refused to request some readbacks from the court reporter and told the jurors to rely on her notes, which she had tabbed."

Assuming that Foreperson M. told the jurors to rely on her notes, she also told the jurors to rely on their own notes and recollections. Foreperson M. stated that she "encouraged jurors to express what their respective recollections were and share what their notes indicate and several of the jurors did so. In doing this, we were able to resolve most of the conflicts without resorting to a readback. However, during the times that we couldn't agree on the testimony, we did request readbacks." Consistent with the jurors' decision to request a readback only if they could not agree on the evidence, there is no indication that any of the jurors objected during deliberations that Foreperson M. was improperly refusing to transmit their requests for readbacks.

Given the jurors' agreement to only request readbacks of testimony when they could not agree on the evidence, we defer to the trial court's determination that Foreperson M. did not improperly refuse to transmit requests for readbacks.

3. Practice of Law

Before the trial began, the trial court admonished Foreperson M. "not to be a lawyer in the jury room and . . . not to do any legal research on any of the issues." Ophir contends that Foreperson M. violated this admonition. According to Juror R., Foreperson M. told the jury that "based on her experience as a district attorney, [the misappropriation] instruction was implying a certain meaning that she knew from her other experiences as a district attorney." According to Jurors R., K., and G., Foreperson M. told the jury, "'I know this is not a criminal case but in criminal law . . . this is how the issue would be resolved.'" Foreperson M. also "used the phrase 'Assuming arguendo' a lot."

Although Foreperson M. stated that she was "very conscious" of the trial court's admonition and was "fair and impartial throughout the entire trial and deliberations," she did not specifically respond to the allegation that she had commented on how issues are decided in criminal cases. Ophir argues that Foreperson M. "never denied that she practiced law in violation of the court order[,] only that she 'was conscious of this admonition during the trial.'"

Based on Foreperson M.'s failure to deny the alleged remarks, Ophir contends that she committed misconduct, thereby creating a rebuttable presumption of prejudice (citing *English v. Lin* (1994) 26 Cal.App.4th 1358, 1364) that is difficult to rebut given the nine-to-three jury verdict (citing *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98). We conclude, however, that without more evidence concerning the substance of Foreperson M.'s remarks, we cannot say they were so improper as to constitute misconduct.

Having independently reviewed the record to ascertain the strength of the evidence that misconduct occurred and the nature and seriousness of the alleged misconduct (*Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 557), we find the vague descriptions of Foreperson M.'s remarks inadequate to permit a finding of misconduct. Without more details, we cannot say that remarks such as, "this is how the issue would be resolved" in a criminal case, and "based on her experience as a district attorney, this

particular instruction was implying a certain meaning," were necessarily misconduct. We do not know what "certain meaning" was ascribed, if any, to the misappropriation instruction. Possibly, Foreperson M. said nothing more than what was stated in the instructions given by the trial court. Although as jurors, attorneys should refrain from explaining the law based on their own legal experience, on this thin record it would be speculative to conclude that Foreperson M.'s remarks were so improper as to constitute misconduct.

4. Bias

Based on the declarations of Jurors R., Aaron M., and R., Ophir contends that Foreperson M. was so infatuated with defendant Bainvoll that she was biased in his favor. Foreperson M. submitted a counterdeclaration directly refuting their claim, and the trial court accepted her denial that she was biased in favor of either party. Accordingly, the contention lacks merit.

D. Juror F.

Ophir contends that Juror F. prejudicially exposed the other jurors to a legal theory that was not introduced at trial. According to Juror R., Juror F. was reading a book about a famous patent trial and "said that if Ophir wanted to protect its trade secrets 'it should have patented them.' I told Bill that he should just listen to the instructions."

The record is silent as to the persons present and the context in which the remark was made. Prejudice would not likely have resulted from a single casual remark about patents. If the remark was made solely to Juror R., no conceivable prejudice could have resulted because Juror R. voted for Ophir after telling Juror F. to "just listen to the instructions." Accordingly, Ophir has failed to establish the existence of prejudicial misconduct.

IV. Attorney Fees

Ophir argues that the jurors made an improper agreement to return a defense verdict based on defendants' payment of attorney fees, which was a topic not addressed by the evidence at trial. According to Juror R., Foreperson M. encouraged the jury to vote for defendants because they had paid millions of dollars in attorney fees.

Although Ophir contends that Foreperson M. failed to rebut this factual allegation, her counterdeclaration proves otherwise. Foreperson M. expressly refuted this allegation by stating, "I never thought nor did I ever tell anyone that one of the reasons I found for the defendants was because 'he had paid enough in attorney fees and that was punishment enough.'" Ophir's counsel contended at oral argument that we should find Foreperson M.'s denial insufficient to rebut the claim of misconduct because she did not deny *saying* the jurors should vote for defendants because they paid substantial attorney fees. We disagree. Foreperson M.'s declaration that she did not harbor such a thought at any time is sufficient to refute Juror R.'s allegation. It was for the trial court to make the credibility call, and given that substantial evidence supports the court's factual finding, we conclude that the alleged misconduct did not occur.

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J. MANELLA, J.